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ABSTRACT

This issue provides some general guidelines for lawyers to follow in advising a school district to consider referral of a student for special education assessment. It provides information on the evaluation and eligibility requirements of the Individuals with Disabilities Education Act, case law addressing child find activities, and criteria for referring students for special education assessment. Factors to consider when referring a child for assessment include: (1) parental communications to school personnel; (2) the student's performance in school; (3) teacher observations; (4) misbehavior that does not improve for a significant period of time; (5) chronic truancy; and (6) failing grades. The responsibility of public schools to refer and assess children in private schools is reviewed, along with relevant case law. (CR)

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Inquiry & Analysis

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Knowing When to Suggest an Assessment for Special Education

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Lawyers who do not regularly handle special education cases frequently get calls from school staff about situations involving students. Knowing when to suggest that a student be referred for an assessment for special education can be an important tool in helping schools spot potential legal problems and avoid them. Below are some general guidelines to follow in advising a school district to consider referral of a student for special education assessment.

FROM WHERE DOES THE DUTY ARISE TO ASSESS FOR SPECIAL EDUCATION?

Under the Individuals with Disabilities Education Act (IDEA) school districts are required to identify, locate and evaluate all children with disabilities who are in need of special education and related services. This duty, commonly referred to as the child find requirement, covers children from 0-21 years of age, including those attending private schools. The obligation on the school district to comply with child find exists no matter the severity of the child's disability.

Once these children are identified and located, the IDEA requires school districts to use testing and other evaluation procedures that are not racially and culturally discriminatory and that are provided in the child's native language or mode of communication. The district has the right to conduct an assessment using the professionals it chooses. The school district cannot use any single procedure or test as the sole determinant of an appropriate educational program for a child. If the parents obtain an independent educational evaluation, the district must consider it but does not have to give it precedence over its own assessment. The district also does not have to pay for any outside assessment that is duplicative or deemed unnecessary.

WHAT ACTIVITIES SATISFY THE IDEA'S CHILD FIND REQUIREMENTS?

Rulings from the Office for Civil Rights of the U.S. Department of Education provide the following guidance:

- Create public service announcements on TV and radio, mail information to parents of children currently enrolled in district schools and post notices.
- Display and disseminate notices that clearly explain the school district's responsibilities.
- Pursue activities that involve active searching and not merely responding to inquiries.
- Ensure that child find activities extend to homeless and migrant children. This could include contact with homeless shelters on a frequent basis, distribution of pamphlets to shelters, notices in the newspaper, billboard advertisements, radio announcements and contact with social service organizations, preschools and day care providers.
- Ensure that child find activities reach children in Head Start programs.
- Continue to send annual written notification of the availability of services and the parents' rights under the law to parents who have previously refused special education services for their children with disabilities.
- If a parent requests a special education evaluation, respond within a reasonable period of time. What is reasonable is determined on a case by case basis.
- Once the need for an evaluation has been established, get consent for the evaluation and ensure that the evaluation is completed. The parents' failure to consent or to pursue the assessment is not an excuse.

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DOES ANY EDUCATIONAL DIFFICULTY TRIGGER A DUTY TO IDENTIFY AND REFER A CHILD FOR SPECIAL EDUCATION ASSESSMENT?

No. Identification of an educational problem alone does not trigger the IDEA and its procedural safeguards. Those protections become applicable if the child has been identified as a child suspected of having a disability and being in need of special education.

- Districts may provide remedial and intervention services to children in the regular classroom for educational difficulties before any determination is made that the child is suspected of having a disability. But once the district has reasonable cause to suspect that the child may be in need of special education, it should not delay in carrying out its statutory responsibilities to evaluate the child for special education.
- For children entering kindergarten, school districts often lack the benefit of past medical or hospital records that would indicate a need for a special education evaluation. Where there is no prior medical history or other indication, school districts have a reasonable period of time to observe the child and attempt behavioral or educational strategies. If the strategies don't work, this may indicate that the child should be referred for a special education evalustion.
- A school district is not obligated to refer a child for a special education evaluation solely because a child has a prior medical diagnosis of Attention Deficit Disorder (ADD) or Attention Deficit Hyperactivity Disorder (ADHD) unless there is some other indication that the child is in need of special education. However, a medical diagnosis of ADD or ADHD does not relieve the school district from its evaluation responsibilities if there is reason to suspect the child needs special education.

WHEN SHOULD A REFERRAL FOR AN INDIVIDUAL STUDENT BE MADE?

The basic rule is that a referral for a special education assessment should be made when the school district has some reason to suspect that the child has a disability and that the child needs special education and related services. As noted above, the school district can attempt other intervention strategies before concluding that an assessment is necessary.

Factors to consider are:

1) parental communications to school personnel;
2) the student's performance in school;
3) teacher observations;
4) misbehavior that does not improve for a significant period of time;
5) chronic truancy; and
6) failing grades.

IS THERE A DUTY TO REFER AND ASSESS CHILDREN IN PRIVATE SCHOOLS?

Yes. The IDEA requires districts to actively seek out disabled private school students. A school district should not refuse to assess a child within its boundaries simply because the child attends a private or parochial institution.

- If a free appropriate public education is available for the disabled child within the school district, the district does not have to pay for the cost of the private school. While services must be made available to meet the needs of private school children, the school district need only spend a proportionate amount of federal funds available under the IDEA to provide these services. Although the IDEA does not require it, the school district may provide the services to children on the premises of private, including parochial, schools to the extent consistent with law.
- If a school district's child find efforts are inadequate and the district fails to apprise the parents of their specific procedural and substantive rights under the IDEA, the district may be required to reimburse the parents for a private school placement. It is not a complete defense to say that the parents had a general knowledge that special education services were available from the district.
- Similar to their public school counterparts, if a parent of a private school student refuses special education services from the district, the district may place the child in child find status. Under this status the district must provide annual notice to the parents of the availability of services, including a statement of rights under the IDEA. The district's obligation does not extend any farther unless an evaluation is requested by the parents.

Find the full discussion of this subject in Archived Articles in the Members Only section of the Council's web site at http://www.nsba.org/coss.

Case Notes

EMPLOYEE RIGHTS

School board did not violate tenured school employee's due process rights when the school board's attorney acted as hearing officer at her pre-termination hearing because the attorney merely acted as an advisor to the board rather than as a prosecutor.

Johnson v. Portales Municipal Schools, No. 97-2369 (10th Cir. October 28, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=10th&navby=case&no=972369

Superintendent informed tenured school employee that he was recommending that the school board terminate her. She exercised

her right under state law to a pre-termination hearing. The school board's attorney acted as hearing officer with the board retaining outside counsel to prosecute the superintendent's charges. Following a full evidentiary hearing, the board voted to terminate the employee. She later submitted her case to arbitration and settled. However, she filed suit against the school board, alleging that her right to procedural due process was violated during her pre-termination hearing. Specifically, she argued that: the hearing was biased because the school board's attorney acted as hearing officer; his rulings regarding discovery matters denied her a fair opportunity to rebut the charges; and the school board's attorney also acted as an advisor to the board and participated in the deliberations regarding her termination. The district court granted the board's motion for summary judgment.

A Tenth Circuit panel affirmed the district court, holding that the board had satisfied the requirements of *Loudermill*. While it agreed she had a protected property interest in her job, it did not find that the procedural safeguards afforded the employee during her pre-termination hearing were inadequate. Addressing her specific allegations, the panel found that the fact that the school board attorney had acted as hearing officer did not constitute a "one-man judge grand jury" as cited from case law by the employee because the attorney's role was confined to acting as hearing officer and merely advising the board. It pointed out that outside counsel acted as prosecutor, therefore, there was no one-man judge and jury. As to her contention that the pre-termination hearing lacked impartiality in regard to the opportunity to present evidence, the panel noted that all due process required at that point was that she have an opportunity to tell her side of the story. It concluded that she had been given that opportunity. The panel also found that the fact that a full evidentiary post termination hearing was available was an important factor in determining that the pre-termination hearing due process afforded the employee was constitutionally adequate.

SECTION 1983

Parents of student who committed suicide at home after being suspended from school failed to alleged facts sufficient to establish the special relationship exception to school officials' qualified immunity because the student was not being involuntarily restrained by a school official at the time of his suicide. However, parents did allege facts sufficient to establish the state created danger exception to school officials' qualified immunity because school officials were aware of his suicidal tendencies and sent him home knowing he would have access to a gun without first notifying the parents, thereby increasing the risk of harm to the student that would not have existed if school officials had not acted to remove the student from school.

Armijo v. Wagon Mound Public Schools, No. 97-2150 (10th Cir. October 30, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=10th&navby=case&no=972150

Special education student, suffering from depression and other emotional problems, was reprimanded for harassing a younger student. When he threatened to harm the teacher who reported the incident, the principal imposed an emergency suspension on him. Believing that the student's presence in school posed a threat of violence, principal instructed the school counselor to drive the student home. However, his instructions where contrary to school policy because the principal failed to either contact the parents before sending the student home or direct the counselor to return the student to the school if a parent was not at home. The student had previously made statements threatening suicide to a school aide. Additionally, the school aide and the counselor were aware that the student had access to guns. The counselor also stated that although he believed he should to talk to the student's parents about the suspension, he made no attempt to do so. Several hours after the counselor had dropped off the student at his house, his parents returned to find the student dead from a self-inflicted gunshot wound. The parents filed suit against the school board, the superintendent, principal, counselor, and the school aide. They brought two section 1983 claims based on the school board's failure to properly train school officials to handle situations involving potentially violent and suicidal students and violation of student's substantive due process rights. The parents also alleged that school officials violated IDEA, which caused the student's death. The district court granted the board's motion for summary judgment with regard to the failure to train and IDEA claims. However, it denied the motion for summary judgement based on qualified immunity on the grounds: (1) the allegations were sufficient to state a state created danger cause of action; and (2) the alleged facts were also sufficient to create a genuine dispute as to whether the school had a "special relationship" with the student giving rise to a duty to protect him. The school board and individual defendants filed an interlocutory appeal, contesting the district court's denial of qualified immunity. The parents contended the appellate court lacked jurisdiction, and also filed a cross-appeal on dismissal of the failure to train and IDEA claims.

The appellate panel concluded that it had jurisdiction over an interlocutory appeal regarding denial of summary judgment on the issue of qualified immunity. It held that its jurisdiction was limited to resolution of the legal issues. It pointed out, however, that because the district court had not identified specific facts in support of its decision to deny the motion, the panel needed to conduct a de novo review including factual questions. Regarding the issue of qualified immunity, it stated there are two exceptions to the general rule that state actors are liable only for their acts, and not those of third parties. The first exception is the special relationship doctrine involving the state's control over an individual that creates a duty to protect the individual. The second exception is the state created danger theory that holds a state liable for an individual's safety if the state has created the danger that harms the individual. Applying the facts to special relationship exception, the panel found that the parents had failed to show involuntary restraint by a school official establishing a duty to protect. It noted that neither compulsory attendance laws for public schools nor inaction by state actors in the face of a known danger, *i.e.*, the student's suicidal tendencies, were sufficient to create a constitutional duty to protect in the absence of a relationship that was custodial in nature. In addition, it concluded that even if there had been a custodial relationship it ended when the student left the car and entered his home. At that point, there was no longer any involuntary restraint by a school official. Turning to the state created danger exception, the appellate panel agreed that the facts alleged by the parents were sufficient to satisfy the requirements of

both *Uhlrig* and *DeShaney*. Specifically, the panel found: the principal and counselor knew of the student's suicidal tendencies; the decision to suspend him caused him to become distraught; they knew he had access to guns at home, and yet took him there in reckless disregard of the risk of suicide; such conduct, taking the allegations as true, could be construed as conscience shocking; and that as such, these facts could be construed to show they increased the risk of harm to the student. However, the panel reversed the district court as to the school aide on the ground nothing in the record supported a conclusion that she caused or created the danger that led to the student's death. Addressing the parents' cross-appeal, the panel stated it would have to exercise pendent jurisdiction if it considered their appeal. It noted that pendent jurisdiction is discretionary and generally disfavored unless the pendent claim is "inextricably intertwined" with the properly reviewable claim. It found that its ruling on the exceptions to qualified immunity had no effect on the parents' IDEA claim. Therefore, the panel refused to exercise pendent jurisdiction over the cross-appeal.

INDIVIDUALS WITH DISABILITES EDUCATION ACT

Amount of attorneys' fees awarded student in IDEA action was properly reduced where the student's action did not involve novel or difficult questions of fact or law and he achieved limited success at his due process hearing. Amount of attorneys' fees was also properly reduced on the ground that student unreasonably protracted the litigation because IDEA's protraction provision applies not only to underlying actions but also to suits for attorneys' fees. School district was entitled to costs under Federal Rule of Civil Procedure 68 where it made an offer of judgment greater than the amount the student recovered at trial because the policy behind the rule to encourage settlement and avoid litigation is not in conflict with the goal of IDEA to protect the welfare of children with disabilities and their parents.

Jason D.W. v. Houston Independent School District, No. 97-20954 (5th Cir. September 21, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=5th&navby=case&no=9720954CV0

Parents of student with attention deficient disorder and speech impairment were dissatisfied with his IEP and requested a due process hearing. The hearing officer found that: (1) the parents were entitled to reimbursement for the fees of the psychologists they retained; (2) the behavior management plan adopted by the district was not appropriate; and (3) the student's placement in a resource class was not appropriate and denied him a free appropriate public education. After rejecting two settlement offers from the school district, the parents filed suit seeking recovery of the total amount of all attorneys' fees and costs. The school district made an official offer of judgment under Federal Rule of Civil Procedure 68, which the parent also rejected. Following a trial, the district court found that the parents had prevailed on only three of the nineteen issues presented to the hearing officer. It also found that the hearing had afforded the parents specific relief they would not have obtained if they had accepted the district's settlement offer. Although the district court ruled that the parents were a prevailing party, it awarded them only a fraction of the fees demanded because it found that at least half the time and effort in the hearing was expended on issues on which the parents did not prevail. The district court noted that on the three issues that parents did prevail, the relief granted at the hearing was little beyond what the school district had offered prior to the hearing. The court also ruled that the parents had unreasonably protracted the litigation on the ground that the amount in fees, costs and expenses that they recovered was less than the amount of the district's settlement offer. The district court then granted the school district's motion under Rule 68 to amend the final judgment to award the school district all costs after the date of its offer of judgment on the ground that the amount of the offer was greater than the amount the parents recovered at trial. The parents' appeal argued that the district court erred in reducing the amount of the attorneys' fees it awarded and in granting the school district's motion for costs.

In a per curiam decision, the Fifth Circuit affirmed the district court. The appellate panel agreed that the parents were a prevailing party. It pointed out, however, that being a prevailing party under IDEA merely makes a party eligible to receive attorneys' fees, but does not guarantee that party will recover the full amount spent on legal representation. The panel found no clear error in the district court's reducing the attorneys' fees on the grounds that parents' action did not involve novel or difficult questions of fact or law and that the parents achieved limited success at the hearing. It concluded that the parents' arguments, regarding the size of the school district, the number of experts that testified at the hearing, and their inaccurate claim that they had contested all of the school district's decisions concerning the student's education, were all unrelated to whether the action involved novel or difficult factual or legal issues. The panel also found ample evidence in the record to support the district court's findings that the parents achieved limited success. It noted that the parents' primary objective in bringing suit to secure placement of the student in another school was unsuccessful. It also rejected the parents' arguments that all the issues were related to the school district's failure to provide a FAPE and that because the issues were interrelated it was impossible to determine how much time was spent on each issue. The panel next turned to the parents' contention that the district court erred in reducing attorneys' fees on the ground they unreasonably protracted the litigation. The parents argued IDEA's protraction provision applies only to underlying actions and not suits for attorneys' fees. The panel rejected that interpretation of the provision, observing that it applies to any action that hinders the "final resolution of the controversy." In addition, it pointed out that the Fifth Circuit along with several other circuits has already held that failure to settle can constitute protraction under section 1415(e)(4)(F) of IDEA.

Regarding the issue of whether the school district was entitled to costs under Rule 68, the panel found that the policy behind the rule, i.e., to encourage settlement and avoid litigation" was not in conflict with IDEA's goal of protecting the welfare of children with disabilities and their parents. It found IDEA encourages settlement through section 1415(e)(4)(F)(i), which requires courts to reduce attorneys' fees for parents/guardians who unreasonably protract final resolution of the controversy. In addition, the panel pointed out that the Fifth Circuit has explicitly approved awards of costs to school districts under IDEA.

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State education agency was not liable as a matter of law under IDEA for local school board's failure to provide disabled student with a free appropriate public education because the state agency was not primarily responsible for the school board's failure.

Gordon v. Board of Education of Howard County, No. 98-1015 (D. Md. October 7, 1998)

1998 WL 709428

Parents of autistic student filed suit against the county school board and state department of education, claiming the board had failed to provide the student with a free appropriate public education under IDEA. The complaint alleged that: (1) the board and the department of education failed to place student in a program specifically designed for autistic students; (2) they failed to provide for his medical needs; and (3) they failed to place him in a program providing him educational benefits. The department of education moved for summary judgment on ground that it was not, as a matter of law, liable for the county board's alleged violations of IDEA. The parents relying on *Gadsby v. Grasmick*, 109 F.3d 940 (4th Cir. 1997), argued that a state education agency is liable under IDEA if it fails to ensure that a local education agency, *e.g.*, county school board, complies with IDEA.

The district court framed the issue, as whether the state department of education may as matter of law be liable for any failure of the county school board to provide a free appropriate public education to the student. It stated that it would not be addressing the merits of whether the county board was liable under IDEA. The court read *Gadsby* as imposing liability on a state education agency only if that agency is primarily at fault for the failure. In other words, the state department of education could only be liable if it failed to provide services to the student after the county board was unwilling or unable to provide them. It found that the parents only notified the state department of the board's failure after they had commenced due process hearings against the county board. The court pointed out that U.S. Department of Education guidelines prohibited the state department from addressing any of the parents' complaints that were part of the pending due process hearing. Based on these findings, the district court concluded that even if the board had failed to provide a free appropriate public education under IDEA, it could not hold that the state department was primarily responsible for the failure. The court granted the state department's motion for summary judgment, holding that the state department of education could not, as a matter of law, be liable for the county's alleged violations of IDEA.

Non-attorney parents did not have right to proceed pro se on behalf of their child under IDEA because parents do not enjoy joint substantive rights under IDEA with their child.

Collinsgru v. Palmyra Board of Education, No. 96-5807 (3rd Cir. November 23, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=3rd&navby=case&no=982010P

Following a state administrative decision denying a child special education services under IDEA, the parents brought suit against the school board and attempted to proceed with a pro se representation of their child. The district court, relying on *Osei-Afrigie v. Medical College of Pa.*, 937 F.2d 876 (3rd Cir. 1991), held that the parents, being non-attorneys, could not represent their child in federal court. After the parents failed to retain an attorney within thirty days, the district court dismissed their suit without prejudice for failure to prosecute. The parents' appeal argued that *Osei-Afrigie* was not controlling because: (1) under IDEA, parents and children share joint substantive rights; (2) as a result, their child's claims are functionally the same as their own; and, (3) therefore, they should be allowed to proceed pro se on the child's claims as if they were their own.

A Third Circuit panel in a two to one split affirmed the district court. It agreed that *Osei-Afrigie* was controlling, and that IDEA did not confer joint substantive rights on parents and their children. However before reaching this issue, the panel determined that it could exercise jurisdiction over the issue, even though the district court's resolution of the issue did not constitute a final decision, based on the collateral order exception to the finality requirement. With the jurisdictional issue resolved, the panel began its analysis of the parents' arguments in support of allowing them to represent their child's interests under IDEA in federal court. It noted that the prohibition on a non-lawyer representing another person in court is a longstanding common law rule. The panel also pointed out that under IDEA Congress expressly provided parents with the right to represent their children in administrative proceedings, while Congress remained silent regarding federal court proceedings. It concluded that this indicated that Congress only intended to permit parents to represent their children in administrative proceedings. Regarding the joint rights theory, the panel found no support for it in either the language of IDEA or the legislative history. It also observed that both the Second and Eleventh Circuits had held that IDEA did not authorize parental representation of a child in federal court. While conceding that neither circuit considered the joint rights theory, the panel found the reasoning of those courts supported its conclusion. The panel then reviewed the parents' policy arguments for permitting parental representation under IDEA. It acknowledged that while finding attorneys to take IDEA cases without having to provide a significant retainer might be difficult, it believed that the statute addressed that concern with its provision for attorneys' fees. It also rejected the policy argument that the parents and children's rights under IDEA are so interwoven as to make them indivisible. The panel pointed out that under IDEA a qualifying child has rights regardless whether that child has parents, while parents, who do not have a qualifying child, have no rights under IDEA.

Parent-attorney, who represented his child in IDEA proceedings, was barred from recovering attorneys' fees as a prevailing party under the fee-shifting provisions of IDEA by the "special circumstances" doctrine.

Erickson v. Board of Education of Baltimore County, No. 98-1075 (4th Cir. December 10, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=4th&navby=case&no=981075P

Parents of child eligible for special education and related services under IDEA requested that the school provide a behavior modification program for the child. After a state hearing officer upheld the school's refusal, the state office of administrative hearings ruled in favor of the parents. The office ordered the school to reimburse the parents for their expenses in providing the program. When the school board failed to comply with the order, the parents filed suit to enforce the order with the father, an attorney, representing the child. They ultimately settled the case with the board agreeing to pay reimbursement expenses and expert witness fees to the parents. However, the district court refused the father's request for attorneys' fees on the ground that when an attorney represent his own child in IDEA proceedings, Congress's legislative intent was best served by denying an award of fees. The parents appealed, arguing that the plain language of the fee-shifting provision in IDEA permits awarding fees even when an attorney-parent represents his own child. The school board countered that the U.S. Supreme Court decision in *Kay v. Ehrler*, 499 U.S. 432 (1991), prohibits such an award.

A Fourth Circuit panel affirmed the district court. However, it rejected the school board's argument that *Kay* was controlling because a parent-attorney in an IDEA case was in essence acting in as a pro se plaintiff for attorneys' fees purposes. While noting that *Kay* had been applied outside the context of section 1988 to FOIA actions, the panel pointed out that no circuit had yet applied *Kay*'s rationale to claims for attorneys' fees by a parent-attorney under IDEA. Responding to the board's argument that IDEA's statutory language supported its view that a parent-attorney's representation of his own child in IDEA proceedings constitutes pro se representation, the panel found that the child, not parent, is the real party in interest in IDEA proceedings, and concluded that references to parental rights were merely accommodations based on the child's incapacity. The panel also cited the Second Circuit, *Wegner*, and Eleventh Circuit, *Devine*, decisions, holding that parents who are not attorneys can not proceed pro se on behalf of their children under IDEA, in support of its opinion that the parents do not have substantive rights under IDEA that allow them to proceed pro se as the plaintiff did in *Kay*. On the other hand, the appellate panel found *Kay* relevant to the present case on the ground that the fee-shifting statute in *Kay* like the one in IDEA was designed to "encourage effective prosecution of meritorious claims…by encouraging parties to obtain independent representation." It found, therefore, that a parent-attorney's representation of his own child was not pro se representation, and that while *Kay* was not on point, its rationale was applicable to the present case. In the panel's opinion, the rationale provided a basis for invoking the judicially created "special circumstances doctrine" to bar recovery of attorneys' fees by a prevailing party where otherwise permitted by a fee-shifting provision when rendering such an award would be unjust. Specifically, it concluded that barring the award of attorneys' fees to parent-attorneys in IDEA cases under the "special circumstances doctrine" furthered the fee-shifting provision's purpose of encouraging effective prosecution of meritorious claims.

ELEVENTH AMENDMENT

State university employee's claim under the Uniformed Services Employment and Reemployment Rights Act (USERRA), alleging discrimination based on his membership in the National Guard, was barred by the Eleventh Amendment because Congress's attempt to abrogate the states' immunity under the war power of Article I was invalid.

Velasquez v. Frapwell, No. 98-1547 (7th Cir. November 12, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=7th&navby=case&no=981547

After being terminated, attorney for state university filed suit against the university. He alleged discrimination based on national origin under title VII and the equal protection clause. In addition, he claimed he was discriminated against based on his membership in the National Guard in violation of the USERRA, which prohibits employment discrimination on basis of membership in the armed forces. The district court granted the university summary judgment on the national origin claims and dismissed the USERRA claim as barred by the Eleventh Amendment. The attorney appealed with the United States intervening on the issue of whether the Congress abrogated the states' immunity when it enacted the USERRA. A Seventh Circuit panel affirmed the district court's summary judgment on the national origin claims without comment. However, the panel engaged in a thorough analysis of both the attorney's and the United States' arguments regarding the Eleventh Amendment issue before holding that the attorney's USERRA claim was barred by the Eleventh Amendment.

The appellate panel rejected the attorney's argument that the USERRA fell within Congress's section 5 power. While it agreed that the statute need not expressly indicate that it was relying on its section 5 power, it found that the attorney had extended section 5 beyond reasonable bounds because the USERRA was too remote from the policies and objectives of the equal protection clause. Specifically, military personnel constituted neither a suspect class nor a group that employers harbor a negative stereotype about, such as the aged or the mentally challenged. As a result, the panel held there was no reasonable basis for concluding that the USERRA was enacted in accordance with section 5. It also found support for its conclusion in the post-*Seminole Tribe* cases that refused to find a basis in section 5 for the minimum wage law. The panel then turned to the United States' war power argument. The government contended that the war power differed from the commerce power because it was not among the sovereign powers of the states prior to the adoption of the Constitution. Based on this difference, the government concluded that the war power did not fall within the *Seminole Tribe* rationale that powers, like the commerce power, that predate the Eleventh Amendment could be utilized to abrogate the states' sovereign immunity. While the panel questioned the historical accuracy of the war power argument, it instead relied on the holdings in *Hans v. Louisiana*, 134 U.S. 1 (1890), and *Seminole Tribe* to hold that the war power does not override state sovereign immunity. Finally, it noted that its holding provided a simplicity and uniformity by applying Eleventh Amendment to all statutes based on Article I powers, rather than courts being asked to pick and choose between the various separate powers conferred on Congress by Article I.

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School district that suspended student who drew and displayed a picture of a Confederate flag in school for violating the school district's racial harassment or intimidation policy, prohibiting the possession on school grounds of any written material that is racially divisive, did not violate student's free speech rights.

West v. Derby Unified School District No. 260, No. 98-1163 (D. Kan. August 11, 1998)

1998 WL 748640

After school district experienced an increased number of racial incidents involving primarily high school students, it adopted a racial harassment and intimidation policy that applied to all students from grades K through 12. The policy prohibited among other conduct, "possession [of] any written material, either printed or [handwritten], that is racially divisive or creates ill will or hatred." The policy listed several examples of prohibited material including Confederate flags. During a math class, a middle school student drew a Confederate flag on a sheet of paper and showed it to several of his classmates. Some of his classmates warned him that he would get in trouble for drawing the flag. One of the students gave the drawing to the math teacher who turned it over to the assistant principal. The assistant met with the student who acknowledged he had drawn the picture. The assistant principal also reviewed the racial harassment policy with the student who acknowledged he knew that the policy prohibited the drawing of a Confederate flag. The assistant principal informed the student that he believed that the student had violated the policy. The student then wrote a statement giving his version of the incident. Based on his investigation, the assistant principal concluded that the student violated the policy and suspended him for three days. The student's father filed suit, alleging that the school district's racial harassment or intimidation policy violated the student's free speech rights.

The district court denied the father's motion for injunctive relief and dismissed his complaint. The court, relying on *Tinker* and *Bethel School District No. 403*, held that the school district had a reasonable basis for forecasting that the displaying of racially divisive materials and images, such as the Confederate flag, unconnected to any legitimate educational purpose would lead to substantial disruption of school discipline. It also rejected the father's arguments that the policy was overbroad and vague. Regarding overbroadness, it found that the limiting construction put on the policy by the assistant principal, *e.g.*, that the student intentionally violated the policy, that other students saw the drawing, and that other students warned him not to draw the flag, saved the policy from being unconstitutionally overbroad. The district court also found that the policy could not be vague as to the student because he testified he was aware he was violating the policy when he made the drawing. Regarding a facial challenge based on vagueness, the court found again that the construction given to the policy by school administrators provided students with sufficient warning of what was prohibited and provided a sufficient guide for enforcement. The district court rejected the father's final argument that the policy sought to impermissibly prohibit speech based on content. It held, based on *Tinker* and *Bethel*, that school districts are constitutionally permitted to prohibit speech that otherwise would be protected where they can reasonably forecast that such speech will substantially disrupt school discipline and the policy is narrowly constructed to ensure it is consistent with the requirements of *Tinker*.

Boston school committee's admissions policy for its examination schools that allocated half of the entering class's seats on the basis of a "flexible racial/ethnic guidelines" violated white applicant's equal protection rights because school committee was unable to establish a compelling governmental interest based on either diversity or remedying the vestiges of past racial/ethnic discrimination.

Wessmann v. Gittens, No. 98-1657 (1st Cir. November 19, 1998)

http://caselaw.findlaw.com/cgi-bin/getcase.pl?court=1st&navby=case&no=981657

After the Boston school committee's minority set-aside admissions policy for its examination schools was ruled unconstitutional, the committee adopted a new admissions policy. The new policy provided that forty five of the ninety seats available to incoming ninth graders would be filled based solely on applicants' composite score ranking, while race/ethnic origin would be the determining factor in filling the other forty five seats among the remaining qualified applicants. A white applicant who was denied admission to the examination school of her choice challenged the policy on the ground that it violated her equal protection rights. The district court ruled that the admissions policy did not violate the applicant's equal protection rights. Relying on *Bakke*, it held that the committee had satisfied both prongs of the strict scrutiny test: a compelling governmental interest based on both diversity and remedying the vestiges of past discrimination; and that the policy was narrowly tailored to serve those interests. On appeal, the applicant argued: that based on *Hopwood*, diversity can never constitute a compelling interest; and that the committee had failed to establish that its policy remedied the vestiges of past discrimination.

A First Circuit panel in a two to one decision reversed the district court and ordered the applicant admitted immediately. The panel began by emphasizing that the school committee's admissions policy was subject to strict scrutiny because it granted preferences based on race/ethnicity. While it agreed that the policy was not a quota, it rejected the committee's assertion that the policy should be subject to a more relaxed standard of review because the flexible guidelines neither benefited nor burdened any particular racial/ethnic group. The panel found that the fact that under the policy the preference could shift from year to year did not alter the fact that the policy extended a preference to individuals based on their identification with a particular racial/ethnic group. As a result, it concluded the policy granted racial/ethnic preferences subject to strict scrutiny. The appellate panel then turned to the first prong of the strict scrutiny test. It noted that the law was unsettled as to what interests constitute a compelling interest. It found that case law supports race-based policies if the purpose is to remedy the vestiges of past discrimination. However unlike the Fifth Circuit in *Hopwood*, the panel refused to overturn *Bakke* and hold that diversity could never constitute a compelling governmental interest. It stated that it would continue to assume that *Bakke* was good law until it received clear direction from the Supreme Court otherwise.

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Addressing the school committee's diversity argument, the panel rejected the committee's argument, based on *Swann v. Charlotte-Mecklenburg Board of Education*, 402 U.S. 1 (1971), that it enjoys broad discretion in deciding the racial composition of its schools because such decisions involve making education policy. It found that *Swann* was a product of its time which was intended to temper courts from rushing to judgment in desegregation cases by preventing court ordered student assignments unless there was proof that the skewed enrollment pattern was caused by unconstitutional student assignment practices. It concluded that *Swann* was not applicable to the present case because it did not involve allegations of maintaining a dual school system through student assignments. The panel also found the committee's argument regarding the education benefits of racial/ethnic diversity unpersuasive because it ignored other qualifications and characteristics that contribute to diversity. It observed that the committee's flexible racial/ethnic guidelines appeared to be a means for racial balancing because the sole point for defining "diverse mix" is race. The panel held that the admissions policy was merely a mechanism for achieving racial balancing which was neither a legitimate or necessary means of advancing the principles of diversity set forth in the policy. It rejected the contention that racial balancing was necessary to diversity because it fosters the ability of minority students to express themselves individually on the ground that the racial isolation premise treats individuals as the product of race, which constitutes unconstitutional stereotyping. As a result, the panel concluded that the committee failed to show that proportional balancing of race contributed to the exchange of ideas. It pointed out that diversity as defined by *Bakke* would not cause an applicant to lose out to another applicant solely on the basis of race. Therefore, the appellate panel held that the Boston school committee's admissions policy failed to satisfy the *Bakke* standard based on diversity as a compelling interest.

The First Circuit panel next addressed the issue of whether the policy satisfied the compelling interest prong on the basis of remedying the vestiges of past discrimination. It noted that while the district court's 1994 order enjoins the committee from future discrimination, it does not require the committee to remedy racial imbalances caused by demographic factors. The panel found that the committee's evidence that the Boston school system's past discrimination created an achievement gap between minority and white students that required present remedial action was insufficient because of the committee's misplaced reliance on title VII employment discrimination cases. Specifically, it found that use of statistical evidence in the present case to show the disparity in the acceptance of minority applicants did not create the same inference of discrimination as it did in employment cases because use of standardized testing during the admissions process eliminated any "barrier to entry" that is present in employment discrimination cases. The panel also rejected the committee's argument that teachers' low expectations for minority students were vestiges of past discrimination requiring present remedial action. It found that the committee's expert testimony lacked specificity in identifying the vestiges in Boston's school system because the expert relied on statistical evidence from Kansas City's school system to prove the lingering effects of discrimination in Boston. It concluded that the committee lacked reliable data to show the correlation between teacher attitudes and poor student performance by minorities. In addition, it found that the committee's reliance on anecdotal evidence failed to establish that the problem was pervasive. The panel stated that the committee's experts' testimony amounted to nothing more than anecdotal evidence and bald assertions without any statistical support. It also observed in dictum that the admissions policy did not act as a remedy for those public primary school students it sought to help because the policy had little effect on them as many of the African-American and Hispanic students admitted to the examination schools came from private schools. The panel ruled that policy violated the white student's equal protection rights on the grounds that the committee had failed to prove it had a compelling governmental interest for granting racial/ethnic preferences based on either diversity or remedying the vestiges of past discrimination.

The concurring opinion mirrored the majority's reasoning regarding the school committee's failure to present evidence sufficient to prove that the committee had a compelling interest based on either diversity or remedying the vestiges of past discrimination. However, the concurring opinion also concluded that the policy failed to satisfy the narrowly tailored requirement. It found the committee's plan overbroad because it provided preferences to minority groups never discriminated against by the Boston school system, such as Asians or African-Americans attending private schools. Further it argued that the policy would not remedy the problem of low teacher expectation of minority students because the policy is aimed at secondary schools rather than primary schools where the harm is occurring.

While the dissenting opinion conceded that it had reservations about the committee's diversity argument, it argued that contrary to the majority, it believed that it was appropriate to look to analogous title VII employment discrimination cases. Based on its analysis of reverse discrimination cases in the employment context, the dissent concluded that the issue in the education context was whether the vestiges of prior discrimination caused present harm to minority applicants. It stated that a school district adopting an admissions policy like Boston's must prove: (1) the existence of vestiges of past discrimination; (2) present harm to minorities; (3) a causal connection between the past discrimination and the vestiges; and (4) a causal connection between the vestiges and present harm. It disagreed with the majority's contention that employment cases were not applicable in the education context because where all applicants took a standardized test, there was no barrier to entry involved as in employment cases. The dissent countered that the evidence showed that the composite score ranking constituted a barrier to entry because it is not a reliable predictor of success for African-American and Hispanic applicants who statistically perform more poorly on standardized tests than white applicants. In addition, the dissent took issue with the majority's finding that the committee failed to prove there was a causal connection between the vestiges of past discrimination and present harm to minority applicants. It instead found that the evidence of an achievement gap was undisputed at trial. It concluded that there was sufficient evidence that Boston's segregated school system led to teachers being ingrained with lower expectation for minority students. The dissent argued that the committee demonstrated the causal connection between low teacher expectation and prior discrimination thereby establishing that low expectation was a vestige of past discrimination. Finally, the dissent rejected the plaintiff's rebuttal evidence that there was

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a neutral explanation for the achievement gap between white and minority students based on socioeconomic conditions.

Even though the majority opinion did not directly address the narrow tailoring prong of the strict scrutiny test, the dissent responded to those points in the majority opinion that touched on the narrow tailoring requirement. It concluded as the district court had that the policy was narrowly tailored to address the compelling remedial goal of eliminating the vestiges of the Boston school system's past discriminatory practices. It found that the program was flexible, i.e., avoided mechanical application of the program's guidelines, and had a limited duration. Beneficiaries of the program were taken solely from the qualified pool. It rejected the student's argument that the committee was required to demonstrate that it first adopted a race neutral policy that failed before it could implement a race conscious policy as unsupported by case law. The dissent also responded to concurring opinion's complaint that the policy favors Asians who as a group were never discriminated against by the school system. It found that categorizing Asians as a separate group did not undermine the fundamental remedial purpose of the policy because there was evidence of significant language skills achievement gap for Asian students.

Neither teacher nor principal were entitled to qualified immunity from female students' suit alleging violation of their right to be free from unreasonable searches when they conducted a strip search of female students after money was reported missing from an unlocked locker in the girls' locker room and a search of the students' pockets did not produce evidence that any of the students had stolen the money.

Konop v. Northwestern School District, No. 97-1022 (D. S.D. November 9, 1998)

http://www.sdbar.org/opinions/1998ds0027.htm

Female eighth grade student reported to the principal that $200 had been stolen from her locker in the girls' locker room. The principal criticized her for failing to lock her locker, but took no further action. Approximately thirty minutes later, the student's mother confronted the principal and demanded he investigate the alleged theft. He locked the girls' locker room and held all the female students in the lunchroom. He threatened them with a strip search and stated that if the money was found, the person responsible would be arrested in front of the whole school. The principal then ordered the girls to empty the contents of their pockets on the table in front of them. Based on accusations from the mother of the student, who reported the theft, the principal questioned one of the students about the source of the money she had in her possession. However, the amount she had was significantly less than the amount reported missing and the principal testified that he did not consider the student a suspect up to the time she was searched. Following the pocket search, all the students were allowed to collect their items, except the student questioned and her friend. Acting on the band teacher's suggestion to search shoes and bras, the principal ordered a strip search. Three female employees, including the band teacher, conducted the searches. After the strip searches were completed, the students' locker room lockers, book lockers, and cars were searched. The principal had no evidence that any of the female students had taken the money. In fact, he had not conducted an investigation to determine if there was evidence to support the theft allegation or who were possible suspects. The school district also conceded that there was no imminent serious harm because school officials were not searching for weapons or drugs. The two students suspected of the theft filed suit under section 1983 against the school district, and the principal and the band teacher in their official and individual capacities, alleging that their right to be free from unreasonable searches had been violated by school officials. The district court in denying the school district's motion for summary judgment rejected outright the district's argument that, as a matter of law, the searches were not unreasonable. After considering the school officials' arguments in support of qualified immunity, the court also denied their motion for summary judgment.

The district court's analysis began by restating the four-prong test for qualified immunity as set forth in *Cross v. City of Des Moines*, 966 F.2d 629, 631-633 (8th Cir. 1992). The court stated the issue in this case as whether a reasonable school official, i.e., principal, would have believed that the strip search conducted by the teacher was lawful, in light of clearly established law and the information the principal and teacher possessed at the time the search took place. It found that the students' allegations that their right to be free from unreasonable searches was violated satisfied the first prong of the test that a constitutional right is violated. Addressing the second prong, the district court rejected the school officials' argument that the right was not clearly established at the time of the alleged violation because there was no existing case law from the U.S. Supreme Court, the Eighth Circuit or any of its district courts, or the state supreme court involving strip searches in a school setting. Relying on Eighth Circuit precedent in *Johnson-El v. Schoemehl*, 878 F.2d 1043 (8th Cir. 1989), and *U.S. v. Lanier*, 520 U.S. 259 (1997), the district court stated that it was not required to find existing case law from one of these courts in order to hold that the right to be free from unreasonable searches in the context of a strip search was clearly established law at the time the search took place. Instead, it concluded that clearly established law can emanate from general principles of law if those principles provide fair warning. As a result the court determined that it was free to look to case law from other jurisdictions. It pointed out that the right to be free from unreasonable searches in a school setting was clearly established by decision in *T.L.O.* It also noted that even prior to *T.L.O.* strip searches were in general found to be unreasonable by the Seventh Circuit. After analyzing several post *T.L.O.* decisions involving searches in a school setting, the district court held that under *T.L.O.*: "(1) a strip search is not justified absent individualized suspicion unless there is a legitimate safety concern (*e.g.*, weapons); (2) school officials must be investigating allegations of violations of the law or school rules and only individual accusations justify a strip search; and (3) strip searches must be designed to be minimally intrusive, taking into account the item for which the search is conducted. It found that the reasonable standard set forth in *T.L.O.* was clearly established and that the principal and teacher should have applied it in the present case. As a result, the court found that the students satisfied the second prong of the qualified immunity test.

Turning to the third prong, the district court rejected the defendants' contention that when considering whether the material facts are in dispute for purposes of a qualified immunity defense, it

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must construe the facts in the light most favorable to the party asserting the defense. The court found, on the contrary, that Eighth Circuit precedent held that the facts must be viewed in the light most favorable to the party charging the violation of rights. After reviewing the material facts, it concluded that at the time of the search, neither the principal nor the teacher had any reason to believe that either or both of the students stole the money. It also noted that it was also clear that the search was not for drugs or weapons. Therefore, it found that the students had satisfied the third prong. The final prong involved whether the principal's and teacher's conduct was reasonably objective based on the law and facts of the case. The district court concluded that the search was not justified because there were no reasonable grounds for the principal or the teacher to suspect that the search would turn up evidence that the students had violated either the law or school rules. Consequently, the court found that neither the principal nor teacher had acted objectively reasonable based on the material facts.

Under *Bakke*, state medical school's admissions policy that took applicant's length of residency in the state into consideration as a plus factor, when all other factors were equal, was constitutionally permissible because it served the compelling state purpose of increasing medical care to under served areas of the state and was narrowly tailored to accomplish that purpose.

Buchanold v. University of New Mexico School of Medicine, No. 96-2129 (10th Cir. October 20, 1998)

1998 WL 730156 (10th Cir. (N.M.))

Applicant was denied admission to state medical school for three consecutive years. On each occasion she was told that her relatively short residency in the state was an obstacle to her admission. After her third rejection, the applicant filed suit against the school and the co-chairpersons of the admissions committee in both their official and individual capacities, alleging that factoring the length of residency into the admissions policy violated her fundamental right to interstate migration. The district court refused to extend qualified immunity to the co-chairpersons in their individual capacities. It also found that the use of the residency factor in the school's admissions policy violated clearly established law, and that the applicant had raised a genuine issue of fact regarding whether the co-chairpersons violated her right to interstate travel. As a result, the district court enjoined the school from further use of the residency factor in its admissions process. The school filed an interlocutory appeal, challenging both the denial of qualified immunity and issuance of the injunction.

The applicant challenged the appellate court's jurisdiction, arguing that the district court had not issued a final decision. However, the Tenth Circuit panel hearing the appeal held that it had jurisdiction on the grounds that appeals of interlocutory orders granting injunctions and denying qualified immunity to government officials are exceptions to the final decision rule. Turning to the immunity issue, the panel concluded that the applicant failed to establish that the school's admissions committee violated clearly established law. The panel's conclusion was based on two grounds: (1) that a school administrator could have reasonably believed that the admissions policy would be subject only to rational basis review, and therefore constitutionally sustainable; and (2) under *Bakke*, it was not unreasonable for the committee to believe that using duration of residency as a plus factor in the admissions process was constitutionally permissible. It pointed out that a state law implicates the right to travel only when it deters travel, when its primary objective is to impede travel, or when it uses classification to penalize the exercise of that right. Finding that the admissions policy factor in the present case was a classification, the panel noted that the Supreme Court has been reluctant to identify when a state-created classification penalizes the right to travel. It observed that durational residency classifications have been upheld when the Court has been impressed by the legitimacy of the purpose advanced. In the present case, the panel found that the school's purpose in considering duration of residency in order to increase the availability of medical care to under served areas of the state was not only legitimate, but also compelling. It concluded that the admissions policy would pass constitutional muster regardless of whether it was subject to rational basis or strict scrutiny. The panel held that the school's policy was a *Bakke*-type plan in which each candidate may compete for every available seat free from strict set-asides for any particular group. It concluded that duration of residency was merely a plus factor to gauge an applicant's propensity to practice in the state which was a constitutionally permissible means of achieving the legitimate and compelling goal of increasing medical care to under served portions of the state. Regarding the injunction, the panel reversed on the grounds that the applicant did not have standing to seek a future injunction because the record was unclear that she intended to reapply to the medical school.

TITLE VII

School district was not liable under title VII for sexual harassment of female teachers by principal based on the theory of hostile work environment where the principal sent anonymous letters, containing sexual content, to the teachers at their homes because the teachers did not suffer tangible employment action as a result of the principal's conduct nor was his conduct severe or pervasive.

Butler v. Yaleta Independent School District, No. 97-50362 (5th Cir. November 16, 1998)

http://www.ca5.uscourts.gov/opinions/pub/97/97-50362-CV0.HTM

Two female teachers at the same elementary school began receiving similar anonymous letters at their homes. While the letters were not threatening, they did contain material of a sexual nature. After one of the teachers began to suspect that someone at the school was the source of the letters, she brought the letters to the principal. He in turn assigned the assistant principal to conduct an investigation. When the teacher later inquired about the status of the investigation, the assistant principal stated nothing was being done, but he thought he knew who was sending the letters and would get back to her. A few months later, she learned that another female teacher was receiving letters of a similar nature, but had not reported them. About this time several female teachers, including the two whom had been receiving letters, were assigned to different grade levels against their wishes. Both teachers began to suspect that the principal was responsible for the letters. The teacher who originally reported the letters withdrew from a number of extracurricular activities and began leaving school early. Neither teacher reported their suspicions

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about the principal to the police until the end of the school year. The superintendent and the associate superintendent only became aware of the investigation when the police contacted them. At that point, the teachers requested that the superintendent remove the principal from the school immediately. However, he refused because the police investigation had not been completed. After the police found fingerprint evidence linking the principal to the letters, the superintendent suspended him, and the principal subsequently resigned. The teachers filed suit against the school district under title VII, alleging sexual harassment based on the theory of hostile work environment. The district court granted the school district's motion for summary judgment as to the teacher who had not reported the letters to the principal on the ground that the school district had neither actual nor constructive knowledge of the harassment until after the school year ended at which time the district took prompt and effective remedial action. However, the district court denied the school district's motion for summary judgment as to the teacher who had reported the letters on the ground that there was a factual issue as to whether the district took prompt and effective remedial action. The jury returned a verdict for the teacher, but the district court granted the school district's motion for a judgment not withstanding the verdict. The court's decision was based on three grounds: (1) the letters the teacher received were not so pervasive or severe as to create a hostile work environment, emphasizing that no harassment occurred at work; (2) the harassment did not alter a term or condition of her employment; and (3) the teacher failed to establish that the school district did not take prompt remedial action. Both teachers appealed, arguing that the school district was liable for the principal's sexual harassment because he created a hostile work environment by subjecting the teachers to a tangible work action or, in alternative by engaging in conduct that was severe or pervasive.

A unanimous Fifth Circuit panel affirmed the district court's decisions as to both teachers. The panel began its analysis by observing that *Faragher*, *Burlington*, *Gebser*, and *Oncale* had clarified and refined sexual harassment doctrine. In particular, it credited these decisions with providing the necessary groundwork for courts to be able to separate offensive workplace behavior with merely sexual overtones from those meritorious claims that constitute sex discrimination under title VII. It pointed out that the Supreme Court had distinguished two types of sexual harassment cases: those in which "a supervisor takes a tangible employment action against a subordinate;" and those in which there is no tangible employment action, but the supervisor's "severe or pervasive" conduct creates a sexually objectionable hostile environment. The panel rejected the teachers' argument that they suffered a tangible employment action because the principal reassigned them to different grade levels. It concluded that the teachers had failed to establish that the reassignments were connected to the letters, and that at any rate the reassignments were ultimately reversed. In addition, the panel found that the teacher's withdrawal from extra curricular activities did not constitute a "change in employment status" as defined by the Supreme Court. Turning to whether the principal's conduct was "severe or pervasive" creating a hostile work environment in the absence of a tangible employment action, the panel pointed out that based on *Faragher*, the employee must establish that the supervisor's conduct created a sexually objectionable environment that was offensive both objectively and subjectively. In other words, it must be an environment that a reasonable person would find hostile, and one that the employee in fact perceived to be so. It concluded that the jury could have determined that the teachers were offended and frightened by the letters, but a reasonable person could not have perceived the work environment as hostile. The panel based its conclusion on four factors: (1) frequency of the discriminatory conduct, (2) severity of the conduct, (3) whether the conduct is threatening, and (4) whether the conduct would interfere unreasonably with a reasonable person's work performance. It found that the letters were infrequent, were less severe because they were not displayed or circulated publicly, were not of a threatening nature, and that they did not interfere unreasonably with either teacher's work performance because the letters were received at home not school. As a result, it concluded none of the factors supported the teachers' claim that the principal's conduct was severe or pervasive creating a hostile work environment. It observed that workplace harassment is not automatically discrimination because of the sexual content of the words. It stated that the critical issue in title VII cases "is whether members of one sex are exposed to disadvantageous terms or conditions of employment to which members of the other sex are not exposed."

School board was not liable for either racial or gender discrimination under title VII, section 1981, or section 1983 for superintendent's decision not to reclassify white female secretarial employee as office manager because the evidence did not support the jury's finding that the superintendent's reasons were a pretext for either racial or gender discrimination, but rather showed that the superintendent's proffered nondiscriminatory reasons were consistent with school board policy and practice.

Baltazor v. Holmes, No. 97-30435 (5th Cir. December 8, 1998)

http://caselaw.findaw.com/cgi-bin/getcase.pl?court=5th&navby=case&no=9730435CV0

White female secretarial employee with the school board was transferred from the child nutrition department to employee relations. After her transfer, she assumed many of the duties and responsibilities of the former office manager. The employee reported to a white associate superintendent. He failed to act on her request for reclassification to the office manger's position until his retirement. The employee renewed her request to her new supervisor. The new associate dean, who was a black male, acted immediately, sending her request with his recommendation to the superintendent. The superintendent forwarded the request to the board's director of personnel, who was a white female. She disagreed with the associate superintendent's recommendation. Specifically, she found that: (1) the employee had not been transferred to the office manager's position; (2) the previous office manager's duties had been reduced before his retirement; (3) before the position could be reestablished at a new salary level, it would have to be posted in accordance with board policy; and (4) even if the position was reestablished, the classification levels sought by the employee and recommended by the associate superintendent were both excessive. Based on the director's findings, the associate superintendent retracted his recommendation and the superintendent denied the employee's request for reclassification. The employee filed suit against the board and

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superintendent. The employee alleged that the board had discriminated against her on the basis of race and gender in violation title VII, section 1981, and section 1983. At the close of the employee's case, the board moved for judgment as a matter of law. However, the district court deferred its ruling, and sent the case to the jury. After the jury returned a verdict in favor of the employee for compensatory damages against the board and punitive damages against the superintendent, the defendants renewed their motion for judgment as matter of law. The district court then denied both motions. The defendants appealed the jury verdict and denial of the motions.

In a unanimous panel decision, the Fifth Circuit reversed the jury's verdict on the ground that the employee had failed to present evidence sufficient to show that the superintendent's reason for refusing to reclassify the employee as office manager was a pretextual attempt to disguise his racial and gender based discriminatory intent. The panel stated that the central issue was whether the evidence supported the employee's allegation that the actual reason for the board's decision not to reclassify her at the higher grade was to discriminate against her on the basis of her race and gender. Reviewing the trial testimony relevant to the title VII claim, it concluded that the employee had failed to prove that job responsibilities she assumed were equal to those of the previous office manager. The panel pointed out that the most significant job duties and responsibilities of the office manager position had been either phased out or reassigned to other employees prior to the previous office manager's retirement. It also observed that the employee's reclassification request did not comply with board policy and procedures as the director of personnel had noted in her report to the superintendent. The appellate panel found the record devoid of any evidence that board's reclassification policy acted to the detriment of either whites or women. On the contrary, it concluded that the evidence supported a finding that the board's proffered reasons for declining the employee's reclassification request were consistent with school board policy and practice. The panel next addressed the sufficiency of the evidence supporting her section 1981 and 1983 claims. Regarding the section 1981 claim, it held that the record did not support a finding that the superintendent acted with malice or reckless disregard of the employee's federal rights that would have entitled her to punitive damages. It found nothing in the circumstantial evidence presented by the employee to show that the nondiscriminatory rationale offered by the superintendent was pretextual. As to the section 1983 claim, the panel found that the employee failed to meet her burden of proving that racially insensitive remarks made by the superintendent to other board employees were so pervasive in the workplace that they created a "custom" for purposes of section 1983.

School district was not liable under title VII for retaliatory discharge of assistant principal because: he failed to prove that there was a causal connection between his protected activities, *i.e.*, filing an EEOC complaint or involvement in the union, and the principal's recommendation of termination; or that the principal's stated reasons for recommending assistant principal's discharge were pretextual.

Grady v. Shawnee Public School District, No. 98-6099 (10th Cir. December 10, 1998

http://lawlib.wuacc.edu/ca10/cases/1998/12/98-6099.htm

Assistant principal was disciplined and transferred several times during his tenure with the school district. He also received several negative performance evaluations. During this period, the assistant principal, along with a principal at one of the district's high schools, was active in forming a union for administrators and became its first president. After another negative performance evaluation and reprimand, the superintendent transferred the assistant principal to the high school where his fellow union advocate was serving as principal. While at that school, the assistant principal filed an EEOC complaint and lawsuit, alleging that the superintendent's action was retaliatory. That suit was ultimately dismissed. The principal also encountered difficulty working with the assistant principal. After receiving a negative performance evaluation from the principal, the assistant principal filed another EEOC complaint involving allegations of retaliation and age discrimination. Despite her difficulties with the assistant principal, the principal recommended his contract be renewed for the following school year. The school board approved the renewal recommendation. However, at the end of the school year the principal, believing she could no longer work with him, recommended that the board terminate the assistant principal. The principal articulated three reasons for her recommendation: (1) failure to respond to the guidance provided in his evaluation; (2) failure to fulfill his assigned daily work hours; and (3) his inability to work with administrative staff or fulfill assigned duties. The superintendent concurred with the principal and recommended discharge to the board. Following a hearing, the board voted to terminate the assistant principal. The assistant principal filed suit against the school district, alleging that he was discharged in retaliation for filing an EEOC complaint and his union activities in violation of title VII. The district court granted the school district's motion for summary judgment. On appeal, the assistant principal argued: (1) that he had established a causal connection between the protected activity of filing the EEOC complaint and the principal's recommendation of termination because the recommendation closely followed the complaint; (2) his union involvement was the motivating factor in his termination; and (3) the principal's reasons for recommending termination were a pretext.

The Tenth Circuit affirmed the district court, holding that the assistant principal had failed to meet his evidentiary burden of proving either that the board's decision to terminate was based on his protected activities, or that the principal's formal reasons for recommending his termination were merely a pretext. Addressing the EEOC retaliation claim, the appellate panel rejected the assistant principal's contention that there was a causal connection between his filing the complaint and the recommendation of termination simply because the recommendation closely followed the filing of the complaint. Although it agreed that the close proximity between a protected activity and an adverse employment action may be sufficient to establish a prima facie case of retaliation, it concluded that in the present case the school district had presented overwhelming evidence of legitimate reasons for the terminating the assistant principal. Additionally, the panel found that the assistant principal failed to present convincing evidence of pretext because his evidence consisted of nothing more than conclusory statements regarding the principal's reasons being

untruthful. Further, it found that the EEOC complaint was filed subsequent to the evaluation. As a result, the panel concluded that it could hardly be said that the negative evaluation was in retaliation for filing the EEOC complaint. As to the claim that the assistant principal was terminated in retaliation for his union activities, the appellate panel noted that the recommendation of termination came from the principal who at the time was president of the union. It also pointed out that at the time she testified at the hearing, the principal was no longer employed by the school district. Finally, it found that there was no evidence that any of the board members involved in the decision opposed the union. The panel, therefore, concluded that based on the evidence presented that a reasonable jury could not have found that the board terminated the plaintiff because of his union activities.

What's New . . .in the Supreme Court

DECISIONS

97-889: ***Wright* v. *Universal Maritime Service Corp.***, (U.S. Sup. Ct. November 16, 1998), 67 U.S.L.W. 4013.

Longshoreman who injured his back and heel while working obtained permanent disability status. Approximately three years later, he attempted to return to work. However, several stevedoring companies refused to hire him on the ground that when he settled the claim for permanent disability, he was certified as permanently disabled which meant he was no longer qualified under the collective bargaining agreement (CBA) to perform longshoreman work. The longshoreman filed suit, alleging that the companies had violated his rights under the ADA. The district court dismissed the suit without prejudice on the ground that the longshoreman had failed to pursue the grievance procedure provided by the CBA. The Fourth Circuit affirmed the district court. Relying on *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991), it held that statutory claims may be the subject of an arbitration agreement provided the agreement is enforceable under the Federal Arbitration Act. The Supreme Court granted the longshoreman's petition for *certiorari*.

Justice Scalia speaking for the unanimous Court vacated and remanded the case. The Court ruled that a CBA or longshore seniority plan (LSP) could waive the statutory rights under federal discrimination laws of covered employees only if the arbitration provision contains "clear and unmistakable" language waiving those rights. Addressing what the Court characterized as tension between *Gilmer* and *Alexander* v. *Gardner-Denver Co.*, 415 U.S. 36 (1974), it concluded that it was unnecessary to resolve the issue of the validity of a union-negotiated waiver of employees' statutory rights to a federal forum. Instead, the Court found misplaced the Fourth Circuit's reliance on *Gilmer*'s holding that a general arbitration clause covered federal statutory claims because *Gilmer* involved an individual's waiver of his own rights rather than a union's waiver of the rights of all its represented employees. While the Court agreed that section 301 of the Labor Management Relations Act creates a presumption of arbitrability, it pointed out that the presumption is limited to assisting the courts to interpret the "terms of a CBA." However, it concluded that the presumption did not extend to the arbitration clauses in the present case because nothing in the language of the CBA or LSP incorporated the ADA by reference or explicitly stated that it was a term of employment. As a result, the Court concluded that *Alexander* at least stands for the proposition "that the right to a federal judicial forum is of sufficient importance to be protected against less-than-explicit union waiver in a CBA." It found that the arbitration provisions in the present case failed to meet this standard. Therefore, it held that neither the CBA nor LSP contained a clear and unmistakable waiver of covered employees' rights to maintain claims of employment discrimination in a federal court.

SUMMARY DISPOSITION

97-8906: ***Floyd* v. *Waiters***, 133 F.3d 786 (11th Cir. 1998). Supreme Court granted petitioner's motion for leave to proceed *in forma pauperis* and the petition for writ of *certiorari*. The Court then vacated and remanded the Eleventh Circuit's judgment that a school district could not be held liable under Title IX for the sexual harassment of students by a school security guard unless the students could show that the superintendent or school board were aware of the guard's conduct before the harassment at issue here occurred or that they failed to take appropriate remedial action once it became necessary. Since there was no notice to the board that acts of lower level employees could subject it to liability under Title IX, the Eleventh Circuit ruled that only acts of the board or the superintendent could give rise to liability for monetary damages. The Supreme Court ordered the Eleventh Circuit to further consider the case in light of *Gebser* v *Lago Vista Independent School Dist.*, 118 S. Ct. 1989 (1998).

98-318: ***Louisiana* v. *St. Tammany Parish School Board***, 142 F.3d 776 (5th Cir. 1998). State of Louisiana had requested Supreme Court review of a Fifth Circuit ruling that the state department of education is responsible to pay for the costs of the private school placement of a child with disabilities from the date that the state review panel found the private placement appropriate until the resolution of the local school board's challenge to the panel decision. The Fifth Circuit said that the state panel's decision constituted an agreement between the parents and the state that the private placement was the appropriate one during the pendency of the proceedings. Dismissed under Rule 46 (Dec. 1, 1998).

ARGUED

96-1793: ***Cedar Rapids Community School District* v. *Garret F.***, 106 F.3d 822 (8th Cir. 1997). Supreme Court heard arguments in case which raises the issue of whether the Individuals with Disabilities Education Act requires a school district to pay for one-on-one nursing services for a quadriplegic elementary school student as a related service or whether it is a medical service for which the school district is not obligated to pay. *Cert. granted*, May 18, 1998. Argued, Nov. 4, 1998.

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97-843: ***Davis v. Monroe County Board of Education***, 120 F.3d 130 (11th Cir. 1997). Arguments were presented before Supreme Court on question of whether Title IX of the Education Amendments of 1972 covers claims of hostile educational environment caused by student-to-student sexual harassment. *Cert. granted*, Sept. 29, 1998. Argued, Jan. 12, 1999.

REVIEW GRANTED

98-405, -406: ***Reno v. Bossier Parish School Board & Price v. Bossier Parish School Board***, 7 F. Supp.2d 29 (D.D.C. 1998). Supreme Court has noted probable jurisdiction and consolidated these two appeals from a decision by the U.S. District Court for the District of Columbia that ruled that where it could not be shown that a school board had adopted a redistricting plan with any retrogressive intent, the plan was entitled to preclearance under Section 5 of the Voting Rights Act. Probable jurisdiction noted, Jan. 22, 1999.

REVIEW DENIED

98-172: ***Bering Strait School Dist. v. United States***, 138 F.3d 1281 (9th Cir. 1998). Supreme Court left undisturbed a decision by the Ninth Circuit that local school district is not exempt from the requirement under the Indian Health Care Improvement Act that it reimburse the federal government for health services provided to Alaska Native employees. The local district is not a "state" for purposes of that act. *Cert. denied*, Nov. 2, 1998.

98-376: ***Jackson v. Benson***, 218 Wis.2d 835, 578 N.W.2d 602 (1998). Supreme Court let stand decision by the Supreme Court of Wisconsin which upheld the constitutionality of the Milwaukee Parental Choice Program under which parents may receive vouchers from the state to be used to pay for the costs of sending their children to private schools, including sectarian institutions. *Cert. denied*, Nov. 9, 1998.

98-403: ***Mencer v. Hammonds***, 134 F.3d 1066 (11th Cir. 1998). Supreme Court rebuffed review of Eleventh Circuit ruling that it had jurisdiction to hear interlocutory appeal of district court's denial of qualified immunity to superintendent in case brought by teacher alleging race and sex discrimination in administrator's refusal to appoint her to position as elementary school principal. The court of appeals so held because the denial of immunity was based not on findings about disputed facts but on lower court's determination that the law was clearly established at time of superintendent's action that his conduct would violate the equal protection clause. The Eleventh Circuit granted qualified immunity to the superintendent because the teacher had failed to establish the necessary intent to discriminate. *Cert. denied*, Nov. 9, 1998.

98-410: ***Fister v. Minnesota New Country School***, unpub. op. (8th Cir. May, 11, 1998). High Court denied charter school student's request for review of an Eighth Circuit opinion holding that school did not violate the student's First Amendment right by expelling her for repeatedly displaying in her work space at school a letter from a fellow student's parents on which she had written the comment, "making a mountain out of a mole hill." School acted properly under its policy requiring the removal of harassing materials. *Cert. denied*, Nov. 9, 1998.

98-550: ***Kazanjian v. Anniston, Ala. City Board of Education***, unpub. op. (11th Cir. March 30, 1998). Supreme Court will not hear challenge by nontenured white teacher of Eleventh Circuit's affirmance of district court's dismissal of her law suit claiming due process violations and race discrimination in school board's termination of her employment for alleged failure to maintain classroom discipline. The board replaced her with another white teacher. *Cert. denied*, Nov. 16, 1998.

98-712: ***Strasburger v. Board of Education, Hardin County Community Unit School Dist. No. 1***, 143 F.3d 351 (7th Cir. 1998). Supreme Court left intact decision by the Seventh Circuit that school board members had not violated former teacher's liberty interests under the Fourteenth Amendment due process clause by stigmatizing him with derogatory statements about his criminal record, that he might hurt female students and that he was a rapist. The court of appeals said the statements were either true, opinion, rumor or not necessarily false so there was no due process violation even though the teacher had been removed without a hearing through a reduction in force that involved only him. The court, citing *Paratt v. Taylor*, 451 U.S. 527 (1981), also ruled that teacher's procedural due process claim did not necessitate a federal remedy, although he argued that the board's actions were random and unauthorized, he did not show that the state post-deprivation remedies were lacking. *Cert. denied*, Jan. 11, 1999.

98-738: ***Tennison v. Paulus***, 144 F.3d 1285 (9th Cir. 1998). Supreme Court has declined request by students and parents to review Ninth Circuit decision that their challenge to Oregon education law both facially and as applied failed. The plaintiffs had asserted that the law infringed their First Amendment right to "freedom of the mind" and impermissibly coerced them to adopt and express only those views officially approved by the state. The Ninth Circuit said the plaintiffs had failed to provide even "a single example of how the Act had been applied to violate any constitutional rights of any specific individual." *Cert. denied*, Jan. 1, 1999.

98-760: ***Triplett v. Livingston County Board of Education***, 967 S.W.2d 25 (Ky. Ct. App. 1998). Supreme Court denied *certiorari* in case in which state court had found no violation of the Hatch Amendment, 20 U.S.C. § 1232h, in state requirement that students take standardized tests in grades 4, 8, 12 as condition of promotion and graduation since tests did not compel students to give any personal information as set forth in that federal provision. *Cert. denied*, Jan. 19, 1999.

98-900: ***Collin v. University of Virginia***, unpub. op. (4th Cir. Aug. 31, 1998). Supreme Court turned down request by white professor at state university to review Fourth Circuit holding that he failed to establish a prima facie case of race discrimination under Title VII of the Civil Rights Act of 1964

because he had offered no evidence that he had been denied tenure because he has an African American spouse or because of his advocacy activities calling for racial equality. *Cert. denied*, Jan. 25, 1999.

REVIEW REQUESTED

98-101: ***McCaffrey v. Oona R.-S.***, 143 F.3d 473 (9th Cir. 1998). School officials have asked the Supreme Court to review a Ninth Circuit decision that they were not entitled to qualified immunity in a suit brought under 42 U.S.C. § 1983 for alleged violation of Title IX of the Education Amendments of 1972 because when the incidents at issue in this case occurred in 1992-93, the duty of school officials to respond promptly and effectively to known incidents of sexual harassment of students by other students or school employees was clearly established. Filed, June 19, 1998.

98-126: ***University of Illinois Board of Trustees v. Doe***, 138 F.3d 653 (7th Cir. 1998). School district has petitioned for writ of *certiorari* to Seventh Circuit in case holding that school district may be liable for monetary damages under Title IX if it failed to take immediate action to end student-to-student harassment about which school officials were aware. Seventh Circuit also ruled that state defendants did not have immunity under the Eleventh Amendment. Filed, July 13, 1998.

98-606: ***Taylor v. Rooney***, 143 F.3d 679 (2d Cir. 1998). Teacher has requested that Supreme Court review decision by the Second Circuit that defendant principal was entitled to judgment as a matter of law since she did not in any sense cause teacher's suspension as she acted only to comply with her responsibility to report complaints regarding use of force. Acts of other school officials in investigating and deciding to suspend the teacher were intervening acts that broke any connection between her report and the discipline imposed. Filed, Sept. 22, 1998.

98-764: ***Morton v. Community Unit School Dist. No. 709 v. J.M.***, 153 F.3d 583 (7th Cir. 1998). School district is asking the Supreme Court to review Seventh Circuit's approval as reasonable a hearing officer's finding that school district is required under the Individuals with Disabilities Education Act to pay for medical services needed by severely disabled child who requires constant monitoring of tracheostomy tube and oxygen tank and hourly administering of eye ointment since they are related services and not medical interventions excluded by the Act. Filed, Oct. 22, 1998.

98-789: ***Rooney v. Taylor***, 143 F.3d 679 (2d Cir. 1998). Principal cross petitioned in response to 98-606, (see above) asking the Supreme Court to dismiss the case on collateral estoppel grounds. The principal contends that the teacher should have been precluded from relitigating a factual issue in district court that had previously been decided against him by the disciplinary hearing panel and the state commissioner of education. If the teacher had been properly precluded, according to the principal, he would have been unable to make out a prima facie equal protection claim. Filed, Nov. 12, 1998.

98-964: ***Edwards v. California University of Pennsylvania***, 156 F.3d 488 (3d Cir. 1998). Public university professor is challenging decision by the Third Circuit holding that university may suspend him with pay for using material with certain religious bias in his classes after being told not to do so. First Amendment does not give public university professor right to determine what to teach. Filed, Dec. 11, 1998.

98-983: ***Lacks v. Ferguson-Florissant Reorganized School Dist., R-2***, 147 F.3d 718 (8th Cir. 1998). Teacher who was discharged for allowing students repeatedly to use extreme profanity in classroom presentations and in their written assignments in violation of a school policy banning use of obscenity by students wants Supreme Court to consider whether Eighth Circuit correctly decided that school board did not violate her First Amendment rights in terminating her and that it did not act with any racial animus. Filed Dec. 16, 1998.

98-1114: ***Onstine v. Ramsley***, unpub. op. (9th Cir. Aug. 20,1998). Tenured university professor has requested that Supreme Court review Ninth Circuit holding that grievance procedures available to him under a collective bargaining agreement provided him adequate procedural due process after the university placed him on unpaid sick leave when he failed to respond to a request that he provide a medical evaluation concerning his mental fitness to return to teaching duties after he exhausted eight months of paid sick leave. Filed, Dec. 28, 1998.

98-1145: ***Brewster v. Board of Education of Lynwood Unified School Dist.***, 149 F.3d 971 (9th Cir. 1998). Teacher seeks Supreme Court review of Ninth Circuit decision that school officials were entitled to qualified immunity on claim that they violated his First Amendment rights by discharging him allegedly in retaliation for his allegations that other teachers had been pressured to falsify attendance rep0orts so that district could obtain more state and federal funding. The Ninth Circuit so ruled because it was not clearly established that the First Amendment protected those allegations since they caused disruption between the teacher and his coworkers and supervisor, interfered with his carrying out his duties, were not widely publicized and were ultimately determined to be false. Filed, Jan. 11, 1999.

Chairman's Notes

NOMINATING COMMITTEE REPORT

In January 1999 the NSBA Council of School Attorneys' Nominating Committee* met by conference call to select a slate of candidates to serve as officers and directors for the 1999-2000 year. The committee members are the three immediate past chairmen of the Council and the Council chairman.

In accordance with the Council bylaws, the committee has "attempted to maintain a wide geographical representation on the Council Board of Directors to ensure that the professional interests and concerns of all members throughout the United States are represented." Officers serve for one year, and directors may serve for two 2-year terms. The following slate of nominees is recommended:

* Ann L. Majestic (NC), Gary R. Thune (ND), Benjamin J. Ferrara (NY) and David B. Rubin (NJ).

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Officers

Chairman	James T. Maatsch (MI)
First Vice Chairman	Martin Semple (CO)
Second Vice Chairman	Cynthia Lutz Kelly (KS)
Secretary	Margaret A. Chidester (CA)

Directors for Second 2-year term

Janice F. Doggett (MT)
John W. Osburn (OR)
Anthony G. Scariano (IL)

Directors for First 2-year term

Chris G. Elizalde (TX)
Giselle S. Johnson (OH)
Ronald D. Wenkart (CA)
Deryl W. Wynn (KS)

Elections for officers and directors will be held at the annual meeting of the Council, 8:00 a.m., Saturday, April 10, 1999 at the San Francisco Hilton Hotel, San Francisco, California. Nominations for each position may also be made from the floor during the annual meeting of the Council.

The committee would like to express its sincere appreciation to all individuals who submitted candidates for consideration. The Council will thank Peter L.J. Pashler (IA), Richard A. Schwartz (NC), and J. David Thompson (TX) for their service to the board over the past four years during the annual meeting of the Council.

I look forward to seeing you in San Francisco.

Ann L. Majestic
Chairman

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